Supreme Court, U.S.
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No. 91-2003

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States has a cause of action against the State of California for recovery of taxes when there is no allegation of unconstitutional state taxation, when the tax was admittedly upon a federal contractor, when the tax was paid by the federal contractor and was reimbursed by the United States to the federal contractor, and when the federal contractor's remedies have been barred by the statute of limitations under the law of the State of California?

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ERRORS AND OMISSIONS ON THE STATEMENT OF THE CASE

1. The statement by the United States goes beyond any facts needed to make its argument on the one issue before this Court. Some of the statement by the United States consists of argument on the meaning of the contract between the United States and Williams Bros. Engineering Co. (hereafter "WBEC") and characterization of the contract terms. The respondents agree with the factual statements in the United States' statement, but disagree with the United States' characterization of the terms of the contract. However, since the interpretation of

the contract is not before this Court, respondents will not present their contrary interpretation of the meaning of the contract.

2. In its discussion of the state court proceedings, the United States asserts that the United States was not joined as a party in the action. While this is true, the facts below made it clear that the United States directed and controlled the state court action. (See appendix to the United States' petition, pages 9a and 15a.)

3. While WBEC timely filed the state court actions, which were ultimately dismissed without prejudice in 1988, sections 6932, 6933, 6902, and 6905 of the California Revenue and Taxation Code prohibited any actions after June 2, 1985. This statute of limitations would have barred WBEC from filing another suit at the time the United States filed this action and it also bars the United States from doing so. The fact that a case may be dismissed without prejudice does not extend the statute of limitations and, thus, when the statute of limitations runs before another suit is filed, no suit may be filed. A court has no jurisdiction to hear a case which was filed after the statute of limitations runs, even if that suit was previously dismissed without prejudice.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE LEGAL RELATIONSHIP OF THE PARTIES REQUIRES DENIAL OF THE PETITION

The one fact that makes this case different from all of the cases relied upon by the United States is the lack of any allegation by the United States that it was being

unconstitutionally taxed by the State of California. This fact is significant because, in the absence of such allegation, an analysis of the legal relationship of the parties must consider the tripartite nature of the relationship between WBEC, the United States, and the State of California. Lacking any allegation that the State of California was unconstitutionally taxing the United States, the United States can claim no independent standing to sue respondents. The only rights that the United States can claim are derivative of its contractual relationship with WBEC. Because the incidence of the tax is not upon the United States, *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941); *United States* v. *California State Bd., etc.*, 683 F.2d 316, 318 (9th Cir. 1982), the taxpayer in this case is WBEC. WBEC, in fact, paid the taxes to the State of California. The United States' failure to allege unconstitutional taxation by the state, requires this Court to rely only upon the tripartite relationship between the United States and WBEC and WBEC and the State of California to find a cause of action.

Assume, for example, that the contract between the United States and WBEC required WBEC to pay state taxes without any reimbursement from the United States. Would the United States then have an action against the State of California if there were no allegations of unconstitutional taxation upon the United States? The answer is obviously no. Under that scenario, if the State of California overtaxed WBEC, the United States could not state a claim against the State of California.

Underlying the United States' petition is the fundamentally-flawed premise that the agreement whereby the United States reimburses WBEC for taxes paid to the State of California gives the United States a cause of

action against the State of California. Yet, the United States does not cite one case that supports this premise. The only legal rationale that can be developed from the scenario where the United States reimburses WBEC for payment of state taxes is that if WBEC paid too much and is due a refund, that refund should go to the United States under principles of equity. The most accurate description of the right created by the reimbursement provision of the contract between the United States and WBEC is that it causes an equitable assignment of WBEC's cause of action against the State of California. This describes the legal concept of subrogation. *Allianz Insurance Co.* v. *Municipal Court*, 126 Cal.App.3d 1043, 1046; App., 179 Cal.Rptr. 334, 335 (1981); *Royal Indem. Co.* v. *Security Truck Lines*, 212 Cal.App.2d 61, 64, 27 Cal.Rptr. 858, 860 (1963).

Thus, the only common law principle underlying this action is not, as the United States argues, "money had and received" (indebitatus assumpsit), but the principle of subrogation. Subrogation can be of two kinds, legal and contractual, *Fifield Manor* v. *Finston*, 54 Cal.2d 632, 638, 354 P.2d 1073, 1076, 7 Cal.Rptr. 377, 380 (1961), and the rights accruing to a subrogee do not differ whether a party is subrogated under equitable principles or under contract. *Snider* v. *Basinger*, 61 Cal.App.3d 819, 824, App., 132 Cal.Rptr 637, 639-640 (1976). The primary rule in subrogation is that the subrogee takes no greater rights or remedies than the subrogor. *Liberty Mut. Ins. Co.* v. *Fales*, 8 Cal.3d 712, 717, 505 P.2d 213, Sup., 106 Cal.Rptr. 21, 24 (1973); *March* v. *Barnet*, 121 Cal. 419, 53 P. 933, 934 (1898); *Randall* v. *Duff*, 107 Cal. 33, 35, 40 P. 20 (1895); *Redington* v. *Cornwell*, 90 Cal. 49, 58, 27 P. 40, 42 (1891); *Iusi* v. *City Title*

Ins. Co., 213 Cal.App.2d 582, 588, 28 Cal.Rptr. 893, 897 (1963). If the subrogor has no remedies, the subrogee has no remedies. *Commercial Union Assurance Co.* v. *City of San Jose*, 127 Cal.App.3d 730, 734, 179 Cal.Rptr. 814, 816-817 (1982).

Under this common law principle, the United States, as the subrogee of WBEC's claim against the state, has no claim against the State of California because WBEC had no valid claim against the state when the United States filed suit in this action. Under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1937), a federal court sitting in diversity is obligated to apply the substantive law of the state. *United States* v. *Anderson County, Tenn.*, 761 F.2d 1169, 1173 (6th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985).

II.

INDEBITATUS ASSUMPSIT CANNOT BE THE BASIS FOR THE UNITED STATES' CAUSE OF ACTION

Prior to the time that statutory remedies were made available to taxpayers in seeking to recover overpaid taxes, the common law doctrine of indebitatus assumpsit was the source of the taxpayers' right to recover any money.[1] The United States' reliance on this common law

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[1] In the older cases cited by the United States in its petition, it is clear that a taxpayer could recover only when the payment was involuntarily made and a protest was made prior to a collector's act of turning the money over to the government. If the payment was made voluntarily and the money was turned over to the government without protest, there could be no

principle, however, is misplaced. The cases cited by the United States in its petition each involves a suit between the taxpayer and the taxing authority. In other words, the taxpayer who paid the tax sued the entity having wrongful possession of money belonging to the taxpayer. In this case, however, the United States paid no taxes to the State of California and was not a taxpayer under either state or federal law. The common law action based on money had and received is an action whereby one party is indebted to the other party in some legal or equitable way. The United States, as stated above, would have an argument if the issue of unconstitutional state taxation was present in this case. Lacking that issue, however, the only party that may be said to be indebted to the United States is WBEC, and this indebtedness arises out of the contract between the United States and WBEC.

In its petition for a writ of certiorari, the United States does not explain how it has a cause of action for unjust enrichment by the State of California directly at the expense of the United States. In footnote 3 the United States states that " . . . It is sufficient for the plaintiff to show that money equitably belongs to him, even if it was paid to the defendant by another." The cases cited in that footnote, however, do not support the United States' virtually unlimited application of the rules concerning the action of money had and received. In *Bayne, et al. Trustees* v. *United States*, 93 U.S. 642 (1876), there was a criminal misappropriation of United States funds by Paulding and

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recovery even if the taxes were overpaid. *William B. Bend* v. *Jesse Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839).

Bayne. This Court held that an action in assumpsit will lie whenever the defendant has received money *which is the property* of the plaintiff. In the case at bar it was WBEC's money, not the United States' money, that was paid to the Board of Equalization. The fact that the United States had a contractual obligation to reimburse WBEC for taxes paid to the state does not convert those funds received by the state into property owned by the government. The distinction between *Bayne* and the case at bar is that in *Bayne* the United States had an undisputed right to the property, and in this case it does not.

Gaines v. *Miller*, 111 U.S. 395 (1884) also cited by the United States does not support its position. In that case, Gaines was the daughter of one Daniel Clark, but she did not find out she was Clark's daughter until many years later. Clark had executed an 1811 will, but just before he died in 1813 he lawfully executed a new will leaving everything to his daughter and revoking the 1811 will. However, the executors under the 1811 will began to administer Clark's estate illegally. The executors appointed an agent to sell some of Clark's property and the agent sold the property but did not turn over the money to the executors and in 1815 absconded with the money. The executors then received a judgment in 1819 against the agent, Hammond. Miller was the administrator of Hammond's estate and Gaines, having learned that she was Clark's daughter, sued the estate. This Court held that Hammond had money that belonged to Gaines and

thus Gaines had an action in assumpsit.[2] The action at bar is different, however, because if there is any right to recover money from the State of California, it is WBEC's and not the United States'. The United States would have a suit for money had and received only against WBEC if WBEC were to recover money from the state. These two cases relied upon by the United States show clearly that no action for money had and received lies in this action.

The third case cited by the United States in footnote 3 of its petition is different from the other two, but it states the same principles. This Court in *Galante* v. *Commodity Credit Corporation*, 71 F.Supp. 963 (S.D. Calif. 1947) held that assumpsit will lie whenever the defendant has received money *which is the property* of the plaintiff. As stated above, the State of California received money belonging to WBEC and not the United States. The fact that the United States agreed to reimburse WBEC does not convert these funds into property of the United States. The United States has never shown, and cannot show, that the money paid by WBEC to the State of California belongs to the United States.

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[2] However, the delay in discovering that Gaines was Clark's daughter was ultimately fatal to the action because the court held Gaines could not recover under a Missouri statute that conclusively presumed satisfaction of a judgment after 20 years.

In looking at the case at bar, any analysis must consider the tripartite relationship between WBEC, the United States, and the State of California. WBEC paid the taxes to the state, filed petitions for redetermination, filed claims for refund, and filed a state court lawsuit. It is only because of the United States' contractual agreement to reimburse WBEC for the amount of state taxes paid, that the United States has any interest in the taxes paid by WBEC. If there is any indebtedness which can form the basis for an action based upon money had and received, it is the direct indebtedness that WBEC would owe to the United States if any taxes were recovered. The United States, however, has no independent right of action against the State of California.

A cause of action for money had and received lies when there is unconstitutional taxation of the United States.[3] *United States* v. *Michigan*, 851 F.2d 803 (6th Cir. 1988) [federal credit unions were a constituent part of the United States, and therefore exempt]; *United States* v. *City of Manassas, VA.*, 830 F.2d 530 (4th Cir. 1987) [tax is discriminatory because it discriminated against contractors of the United States]; *United States* v. *Dekalb County*, 729 F.2d 738 (11th Cir. 1984) [United States mistakenly paid double assessments on the same property]; *City of New Orleans* v. *United States*, 371 F.2d 21 (5th Cir. 1967), *cert. denied*, 382 U.S. 944, *reh'g. denied*, 389 U.S. 890 (1967) [state law manipulation amounting to a "procedural trap"

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[3] Unconstitutional taxation by a state is limited to: (1) tax on a contractor who is a constituent part, or an arm, of the government; (2) a tax which discriminates against the federal government; and (3) a tax which substantially interferes with the activities of the United States. *United States* v. *New Mexico*, 455 U.S. 720, 735, n. 11 (1982).

resulted in deprivation of a chance for the federal government to pursue its remedies before the state time limit had run]. In *City of New Orleans*, there had been prior state court proceedings. In those proceedings United States ownership had been established by an adjudication on the merits and was held to be binding on the city as a party in privity. It was this adjudication that raised the sovereign immunity issue that is absent in this case.

A variation on this theme of unconstitutional taxation is illustrated by the case of *United States* v. *Broward County, Fla.*, 901 F.2d 1005 (11th Cir. 1990). In that case, federal statutes authorized the local taxation of an interest in real property acquired by the United States under the Public Buildings Program. The county taxed the interest of the United States from 1979 to 1985 at values ranging from $10.8 million to $17.6 million. The United States paid its taxes under protest arguing that the county officials had improperly valued the property under state law. The United States asserted a value of $7.4 million as of 1981 and that, with appropriate adjustments, this should be the value of the federal taxable, interest. The *Broward County* case is much different than the case at bar because the United States' property was taxable and the United States was the taxpayer, and thus the United States had a primary right to assert improper taxation and to sue under money had and received. The case at bar is different, as stated above, because here the tax is not on the United States nor is the United States the taxpayer.

While an action for money had and received lies when there is unconstitutional state taxation of the United States, it does not lie when the United States

merely reimburses a federal contractor. The reimbursement does not convert a potential action by WBEC against the state into an independent action by the United States against the State of California. Because the United States' claim is based solely upon the rights it derived from WBEC, it is clear that federal common law cannot be the basis of this action because WBEC could not have proceeded under federal common law.

Indeed, this Court has held that it matters how the United States acquires its cause of action. In *United States* v. *Buford*, 28 U.S. (3 Pet.) 12 (1830), this Court ruled that the transfer of a claim to the United States cannot give it any greater validity than it possessed in the hands of the assignor. The *Buford* court held that when the statute of limitations ran before the assignment, the government took the assignment with that disability. *Id.* at 30. See also *United States* v. *Nashville, Chattanooga & St. Louis Railway Company*, 118 U.S. 120, 125-126 (1886).

In this case the United States acquired its claim from WBEC, a nongovernmental entity. Thus, the United States steps into the shoes of WBEC and is subject to the same disabilities possessed by WBEC when the United States acquired the claim. WBEC could not have prosecuted a refund action when the United States filed this action, and therefore, as in *United States* v. *Buford*, 28 U.S. (3 Pet.) 12, the United States is barred from pursuing this action.

Nor is the United States prejudiced in any way by this result. In its petition, at pages 13 and 14, the United

States speaks of the potential disaster of a federal contractor not diligently asserting its rights thereby foreclosing any United States' action. The problem with that argument in this case is that it is clear, and the Ninth Circuit so held, that the United States controlled and directed WBEC's actions from beginning to end in this case. The United States directed WBEC to appeal to the Board of Equalization; the United States directed WBEC to file the state court actions; the United States controlled the state court actions, including the dismissal. The federal contractor did not sleep on any of the United States' rights in this case.

In addition, the other side of this argument raised by the United States is that there is also a public policy that tax matters be finalized as to the State of California. The United States had one bite of the apple when it directed and controlled WBEC's state court actions and now is in the process of "forum shopping" in order to obtain a second bite. The State of California has a fundamental interest in a tax collection process that is final and complete.

III.

DECISIONS HOLDING THAT STATE STATUTE OF LIMITATIONS CANNOT CIRCUMSCRIBE FEDERAL ACTIONS DO NOT APPLY IN THIS CASE

The United States in its petition for a writ of certiorari tells this Court that there is an absolute and inflexible rule that federal actions can never be subject to a state statute of limitations. In making this argument the United States ignores precedent and converts a complex

set of rules as to how state statutes of limitations apply to federal actions into a one rule serves all purposes approach. The United States is wrong in its approach.

The general rule as to how federal actions are impacted by state statutes of limitations is that if Congress has not acted with respect to a statute of limitations, the state statute of limitations of the forum state is applied. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1975); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1974); *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 703 (1965); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1913); *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, 397 (1906); *McClaine* v. *Rankin*, 197 U.S. 154, 158 (1904); *Campbell* v. *Havenhill*, 155 U.S. 610 (1894); *M'Clunny* v. *Zillman*, 28 U.S. (3 Pet.) 270, 277 (1830). See also *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 375 (1971) (Rehnquist, J. dissenting in part) [unless the United States is suing in its sovereign capacity, absent any federal statute of limitations, the statute of limitations of the particular state is applicable].

The United States assumes that it has an action for money had and received and that therefore the federal statute of limitations applies. As pointed out above, however, the United States has no action for money had and received. The United States acquired its claim from WBEC and is asserting only state causes of action [interpretation of state statutes and interpretation of state administrative regulation]. It is indisputable that there is no federal statute of limitations on such state causes of action and therefore it follows that the state statute of limitations applies.

The United States' reliance on *United States* v. *Summerlin*, 310 U.S. 414 (1946) is misplaced. In that case, the United States acquired a claim against an estate by virtue of the decedent's actions. The United States did not file its claim within the 8-month period under state law. This Court ruled that a state statute could not invalidate an otherwise *valid* claim. The *Summerlin* court held that a state goes beyond its power when it seeks to invalidate a valid claim by means of a statute of limitations.

The United States cannot fall under this rule because it did not acquire a claim that could have been prosecuted by WBEC. If the statute of limitations ran against the claim before the United States acquired it, the United States is subject to that disability.

As the Ninth Circuit Court of Appeals stated in *United States* v. *Hartford Accident and Indemnity Co.*, 460 F.2d 17 (9th Cir. 1972), *cert. denied*, 409 U.S. 979 (1972):

> " . . . Inherent in the language of the Supreme Court is the requirement that the government must have become entitled to a claim and acquired a cause of action before it comes under the umbrella of 28 U.S.C. § 2415." *Id.* at p. 19.

The Ninth Circuit Court of Appeals was correct in holding that 28 U.S.C. § 2415 does not provide the United States with a cause of action in this case, and before the statute of limitations contained in 28 U.S.C. § 2415 applies the United States must demonstrate it has become entitled to a claim. The United States has failed to demonstrate that essential ingredient. The Ninth Circuit Court of Appeals found no such valid claim and this Court

should deny the petition for a writ of certiorari on the same basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: August 10, 1992.

Respectfully submitted,

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